UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Court of Appeals
Tenth Circuit
Dec. 05, 1995
Patrick Fisher,
Clerk

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, JER PARTNERSHIP,	)	
Plaintiffs-Counter-Defendants-Appellees,	)	
v.	)	No.95-1056
WILLIAMS NATURAL GAS COMPANY,	)	(D.C. No. 94-N-251) (D. Colo.)
Defendant-Counter-Claimant-Appellant.	)	

ORDER AND JUDGMENT*

Before TACHA and BARRETT, Circuit Judges, and BROWN,** Senior District Judge.

**Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This case requires us to interpret another portion of three long-term natural gas purchase contracts that were in dispute in Northwest Central Pipeline Corp. v. JER Partnership, 943 F.2d 1219 (10th Cir. 1991). In 1982, defendant pipeline company entered into "take-or-pay" agreements with Yuma County Oil Company, JER Partnership, and a collection of entities known as the Lockridge Group, respectively, to purchase gas from wells in Yuma County, Colorado. Id. at 1221. At issue in Northwest Central Pipeline were the provisions concerning defendant's right to "market out" of the contracts and the price to be paid upon deregulation of the gas subject to the contracts. Id.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

At issue in the present appeal is the meaning and effect of the following provisions:

> 21. Term
>
> This Contract shall remain in full force and effect from the date hereof and shall extend for a period of twenty (20) years from the date of initial delivery of gas hereunder.
>
> 22. Preferential Right to Purchase and Right of First Refusal
>
> Upon the expiration of the primary term of this Contract, Seller hereby grants to Buyer the preferential right and the right of first refusal to purchase gas produced from the wells, leases and lands described on Exhibit "A" attached hereto. At least thirty (30) days, but not more than ninety (90) days, before the expiration of this Contract, Seller may make a bona fide offer to Buyer to sell that natural gas which may thereafter be produced from such wells, leases, and lands. If no offer is made by Seller to Buyer within the time above described, then that natural gas thereafter produced from the wells, leases and lands described on Exhibit "A" will continue to be sold to Buyer under the terms and conditions of this Contract. Thereafter, Seller shall have the right to make a bona fide offer at least thirty (30) days, but not more than ninety (90) days, before the next

anniversary date of this Contract and each and every anniversary date thereafter until Seller shall make a bona fide offer to Buyer within the above described time period prior to any succeeding anniversary date.

If Buyer rejects Seller's offer and subsequently a third party accepts an offer by Seller to sell the gas subject to this Contract, then Seller, before selling such gas to a third party, must promptly present the offer accepted by the third party to Buyer, together with the name and address of such third party. Seller shall also promptly deliver to Buyer the written offer or contract, if any, agreed to by Seller and the third party. Buyer shall thereupon have an option for a period of ten (10) days after receipt of said notice to purchase this gas by accepting such offer. Should said ten (10) days extend beyond the termination date of this Contract, Seller shall continue to sell gas to Buyer under the terms and conditions of this Contract, until the ten (10) days granted to Buyer to exercise his option shall have expired. If Buyer refuses to accept this offer, then Seller is free to sell the natural gas to the third Party that had accepted Seller's offer.

Appellants' App. at 70-71.[1]

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[1] Appellant's Appendix contains a copy of the entire contract between the Lockridge Group, as Sellers, and defendant's predecessor, Cities Service Gas Company, as Buyer. The other two contracts are virtually identical,

Plaintiffs contend that the contract language is not ambiguous and that, pursuant to the plain language, once the twenty-year primary term expires, plaintiffs must continue to sell, and defendant must continue to buy, gas under the same terms and conditions that they bought and sold gas during the primary term, unless plaintiffs offer to sell the gas to defendant at a different price. The district court agreed with plaintiffs as to the interpretation of the contracts and entered summary judgment in plaintiffs' favor. The court declined to address the parties' arguments concerning reformation of the contracts.

On appeal, defendant argues that the contract language is ambiguous, that defendant should be able to introduce extrinsic evidence of the parties' intent to resolve the ambiguity, and that this evidence creates a genuine issue of material fact as to whether, once the twenty-year term expires, defendant is obligated to buy the gas at the primary-term price, absent an offer by the respective sellers to sell the gas at a different price. Defendant further contends that, even if the contracts are not ambiguous, the district court's interpretation is wrong. Also, defendant maintains that it should be able to introduce its extrinsic evidence because the parties did not intend the contracts to be completely integrated. Finally, defendant argues that the district court erred in not reaching its claim for reformation of the contracts.

We review the district court's grant of summary judgment de novo, applying the same standards as the district court under Fed. R. Civ. P. 56(c). Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir. 1995). "Summary

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except that the provisions at issue here are found in ¶¶ 20 and 21, rather than ¶¶ 21 and 22, of the contract with Yuma County Oil Company.

judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. (quotations omitted).

Whether a contractual provision is ambiguous is a question of law, which we review de novo. Northwest Cent. Pipeline, 943 F.2d at 1226. "To ascertain whether a provision is ambiguous, the court must examine and construe the language in harmony with the plain, popular, and generally accepted meaning of the words employed and with reference to all provisions of the document." Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 917 (10th Cir. 1993)(quotation omitted), cert. denied, 114 S. Ct. 1057 (1994).

> The intent of the parties must be determined from the language of the contract itself, although a court may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and the circumstances surrounding the making of the contract. Extrinsic evidence of intent is not admissible until the contract has been judged to be ambiguous.

Id. (quotations and citation omitted). "A dispute between the parties as to the meaning of a particular provision does not itself render the provision ambiguous." Id.

The relevant provisions here are plain and unambiguous. The primary term of each of the contracts is twenty years. Once the primary term expires, the contracts will remain in effect

under the same terms and conditions, unless, during the allotted time periods, the respective plaintiffs offer to sell defendant the gas under different terms and conditions. Because the relevant provisions are unambiguous, defendant cannot introduce extrinsic evidence to vary or contradict their terms. Northwest Cent. Pipeline, 943 F.2d at 1226.

Nor is defendant's extrinsic evidence admissible on the ground that the contracts are not fully integrated. Under Colorado law, the terms of a final written agreement may be "explained or supplemented . . . [b]y evidence of consistent additional terms" if the court finds that the parties did not intend the written agreement to be fully integrated. Colo. Rev. Stat. § 4-2-202(b). In Northwest Central Pipeline, 943 F.2d at 1226, we upheld the district court's determination that the parties did not intend the contracts at issue to be fully integrated.

The extrinsic evidence that defendant seeks to introduce here, however, is not evidence of consistent additional terms. Under the plain language of the contracts, defendant continues to be obligated to purchase gas from plaintiffs after the expiration of the primary term unless plaintiffs offer defendant a new price for the gas, which defendant rejects. Defendant, however, wants to introduce extrinsic evidence that it contends establishes that defendant has no obligation to purchase gas from plaintiffs after the expiration of the primary term. Because the evidence would vary, rather than supplement, the written terms, it is not admissible under the guise of Colo. Rev. Stat. § 4-2-202(b).

Finally, we address defendant's counterclaim for reformation of the contracts. Defendant contends that the district court erred in failing to consider its reformation claim

before entering summary judgment in plaintiffs' favor. "We are free to affirm a district court decision on any ground for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994)(quotations omitted).

"'Reformation may be appropriate when a writing does not reflect the true intention of the parties. See Chilson v. Reed, 389 P.2d 87, 89-90 (Colo. 1964). "'Reformation may be a proper remedy even though the mistake is not mutual. If one of the parties mistakenly believes that the writing is a correct integration of that to which he had expressed his assent and the other party knows that it is not, reformation may be decreed.'" American Casualty Co. v. Glaskin, 805 F. Supp. 866, 873 (D. Colo. 1992)(quoting 3 Corbin on Contracts § 614 (1960)). In a suit for reformation, parole evidence is admissible to establish the parties' true intent. Chilson, 389 P.2d at 89.

Defendant's arguments on reformation are not entirely clear. Defendant appears to argue that the purchase agreements should be reformed because the parties were mutually mistaken in believing that the price of natural gas would continue to rise in the future, even after deregulation. Based on this mistaken belief, the parties executed contracts that had the effect, in a declining market, of binding defendant beyond the expiration of the primary term to a contract price that exceeded the market price for gas. Defendant apparently maintains that, had the parties taken into account the possibility of falling prices, they would have given defendant an option to terminate the contract at the conclusion of the primary term, rather than provide that the contracts would remain in effect under the same terms and

conditions unless sellers offer defendant a different--presumably higher--price for the gas.

Defendant's reformation claim is fatally flawed in several respects. First, the evidence does not give rise to any inference of mutual mistake. The provisions at issue originated with defendant and became part of the final contracts without any discussion by the parties. Nothing suggests that plaintiffs failed to consider the possibility of future declining prices when they executed the respective contracts. To the contrary, the contracts work to plaintiffs' advantage in a declining market. Nor is there any evidence that plaintiffs knew at the time they executed the contracts that defendant's assent to the contracts was based on its mistaken belief that future gas prices would not fall.

Further, the testimony from defendant's own witness casts doubt on defendant's present argument that it failed to consider that prices might fall in the future. Jim Killerain, who negotiated the contracts on behalf of defendant, testified that the language of the relevant provisions accurately reflected defendant's intent, so long as defendant also had a unilateral right to market out of the contracts and the other pricing provisions operated as defendant interpreted them. Appellee's Supplemental App. at 42. Defendant's dissatisfaction with the relevant provisions, therefore, appears to spring not from its alleged failure to anticipate that future gas prices might fall, but from the effects of this court's rulings in Northwest Central Pipeline concerning the contracts' market out and pricing provisions.

Finally, we reject defendant's arguments that the 1981 Letter Agreement, which the parties executed before the

contracts, reflects the parties' true intent and that the contracts should be reformed in accordance with the Letter Agreement. The Letter Agreement provides only for a term of twenty years and does not contemplate that the contracts may continue thereafter. The plain language of the contracts, however, provides for a continuation of the contracts beyond the primary twenty-year term, under specified terms and conditions. To reform the contracts to the terms of the Letter Agreement would be to negate entirely any language about extending the contracts beyond the primary term. Even defendant concedes that this would not reflect the parties' true intent. See Reply Br. for Appellant at 13 ("[Defendant] actually argues that the parties agreed to a twenty-year term which could be extended only under certain limited conditions based on the consent of all parties."). Under the circumstances, the district court properly entered summary judgment in plaintiffs' favor on all claims.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge